Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1993

ISSIAH ROSS, JR., TABITHA HERRING, JAMES C. HOMER, JOHNNIE LEE PALMS, GERRY PLANT, WILLIAM MORGAN PORTER, VERNON ALEXANDER PUTMAN, GEORGE RUMPH, FRANKLIN ROOSEVELT SCOTT, EDDIE SLAUGHTER, JOHN W. TAYLOR, NANNETTE TYSON and HOSEY J. WHITE, JR.

Petitioners,

v.

BUCKEYE CELLULOSE CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Mr. Robert H. Revell, Jr.
COUNSEL OF RECORD FOR PETITIONERS
Suite 3, 2402 Dawson Road
Albany, Georgia 31707
(912) 434-0300

James Finkelstein
Attorney for Petitioners
Suite 114 Albany Towers
235 Roosevelt Avenue
Albany, Georgia 31701
(912) 436-7824

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that in a suit brought under Title VII for wage discrimination where a black employee was paid less money each week for doing the same job as white employees, each week's paycheck (which pays less money to the black than the similarly situated white) is NOT a new cause of action, and the suit is time barred if the black employee does not find out and file charges within 180 days of the first occasion he is a victim of wage discrimination?

2. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit

which holds that in an employment discrimination case brought under Title VII involving wage discrimination against black employees, where an employer uses several different or revised pay systems over a period of eight years, and employees' pay is frequently changed while always leaving the black worker on a lower pay scale than the similarly situated white employee, a black employee who is a victim of discrimination is completely barred from ever filing suit if he doesn't file a charge of discrimination with the EEOC within 180 days of the first occasion the employer discriminates against him by paying a white employee a greater weekly wage for doing the same work?

3. Should this Court grant certiorari to review a decision by the United States

Court of Appeals for the Eleventh Circuit which holds that in an employment discrimination case brought under Title VII involving systematic wage discrimination against black employees, it is NOT a continuing violation of Title VII if an employer pays white employees more money in each week's paycheck than black employees who are doing the same work at the same level of ability?

4. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that if an employer institutes a wage freeze of all employees, and the freeze perpetuates prior discrimination which caused black employees to be paid less money each week for identical work than equally qualified

white employees, this freeze is NOT an act which violates Title VII?

5. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that employees are time barred from filing suit to redress claims of race based wage discrimination due to the disparate impact of an arbitrary and subjective pay system because the employees could have filed a lawsuit earlier and obtained information through discovery which would have revealed that they were victims of a discriminatory pay system, even though the employer denied to the EEOC and to the employees counsel that black employees earned a lower weekly wage than white employees, the employees did not know that the employer was paying a

higher average weekly wage to similarly situated white employees who were doing the same work, did not know that the employer had instituted a secret skills point system and pay curve matrix for calculating pay, and only discovered the information giving rise to their cause of action through discovery provided by Defendant after suit was filed?

6. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that eleven Title VII litigants' claims for pay discrimination by being paid weekly wages less than similarly situated whites were time barred for failure to file a charge of discrimination with the EEOC within 180 days where:

- the Defendant never raised in its answer a statute of limitations defense on the specific ground that the EEOC charges were filed more than 180 days after the violation (only a pro forma general statute of limitations defense was raised)

- the Defendant never raised any statute of limitations defense in any part of the pretrial order, including its contentions on the issue of Title VII disparate impact

- the issue of statute of limitations was never mentioned during the trial

- because the statute of limitations issue was not raised in the pretrial order or during trial, there was no evidence in the trial record as to the date the charges of discrimination were filed with the EEOC for the various plaintiffs

- because statute of limitations was not an issue at trial, Plaintiffs did not introduce any evidence to show when they became aware of claims of pay discrimination or any evidence on the issue of equitable tolling of the statute

- the Defendant never moved for directed verdict at the jury trial or judgment n.o.v. on grounds that the Plaintiffs' claims were barred by an applicable statute of limitations

- the first mention by Defendant that Plaintiffs' claims were time barred came six months after trial in the final brief allowed by the trial court, and the trial court then issued an oral order prohibiting further briefing on any issue

- the trial court specifically found that the Plaintiffs' claims regarding wage

discrimination were not claims subject to being time barred, but even if they were, that the wage freeze instituted by the Defendant was an independent act perpetuating the effects of prior discrimination which would have been actionable under Title VII

- the trial court further specifically found that even if the wage discrimination claims were claims subject to being time barred, that the claims would have been subject to equitable tolling because the Defendant kept secret the information necessary for Plaintiffs to be apprised that they had a wage discrimination claim under Title VII.

6. Should this Court grant certiorari to review a decision by the United States

Court of Appeals for the Eleventh Circuit which holds that in a jury trial of a 42 USC Section 1981 and Title VII Disparate Treatment employment discrimination case with issues involving termination, pay, and conditions of employment, a court can properly exclude the only direct evidence that a plant manager and other decision-making managers used racial epithets such as "nigger", put blacks in an all black "bull gang" to do the dirtiest work, and deliberately fired black employees, because the Plaintiffs' attorney did not use the phrase "smoking gun" when he made an offer of proof to the trial court or "otherwise highlight the significance of the evidence"?

7. Should this Court grant certiorari to review a decision by the United States

Court of Appeals for the Eleventh Circuit which holds that during a jury trial on a 42 USC Section 1981 and Title VII disparate treatment claim of intentional racial discrimination regarding pay, once the Plaintiffs have made out a prima facie case on all issues, the employer can avoid a directed verdict or judgment n.o.v. even if it never calls any one of its decision-makers to explain why a decision was made to pay any of the Plaintiffs less money than similarly situated whites?

8. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that during a jury trial on a 42 USC Section 1981 and Title VII disparate treatment claim of intentional racial discrimination regarding pay, once

the Plaintiffs have made out a prima facie case on all issues, the employer can avoid a directed verdict or judgment n.o.v. by introducing anecdotal evidence from persons other than the actual decision-makers regarding alleged incidents occurring years after or years before the pay decision was made, when similarly situated white employees committed the same infractions but were still paid a higher weekly wage for doing the same work?

9. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that an employer can justify a specific decision to pay a black employee less money than similarly or identically situated whites by relying on

general categorizations of the black as being "lazy" or "average" in skill without giving objective evidence substantiating the opinion, even though higher paid whites are also rated "average" and have no more skill or qualifications than the black employee?

10. Should this Court grant certiorari to review a decision by the United States Court of Appeals for the Eleventh Circuit which holds that during the damages phase of a trial, a trial court can prohibit plaintiffs' counsel from mentioning evidence which was introduced during the trial?

LIST OF ALL PARTIES IN THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS

Plaintiffs and Petitioners herein:

TABITHA HERRING
JAMES C. HOMER
JOHNNIE LEE PALMS
GERRY PLANT
WILLIAM MORGAN PORTER
VERNON ALEXANDER PUTMAN
ISSIAH ROSS, JR.
GEORGE RUMPH
FRANKLIN ROOSEVELT SCOTT
EDDIE SLAUGHTER
JOHN W. TAYLOR
NANNETTE TYSON
HOSEY WHITE, JR.

Defendant and Respondent herein:

BUCKEYE CELLULOSE CORPORATION (now Procter & Gamble Cellulose, a wholly owned subsidiary of Procter & Gamble Company).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This case was reported below as *Ross et al. v. Buckeye Cellulose Corp.*, 980 F. 2d

648 (11th Cir. 1993)(reh. den. 2/8/94), which encompassed consolidated appeals from *Ross et al. v. Buckeye Cellulose Corp.*, 733 F. Supp. 344 (M.D. Ga. 1989), *Ross et al. v. Buckeye Cellulose Corp.*, 733 F. Supp. 363 (M.D. Ga. 1990), and *Ross et al. v. Buckeye Cellulose Corp.*, 764 F. Supp. 1543 (M.D. Ga. 1991). A companion case for two Petitioners herein, Tyson and Rumph, was decided by the United States Court of Appeals for the Eleventh Circuit in an unpublished opinion issued April 20, 1994. (Appendix F.)

On January 4, 1993, the United States Court of Appeals for the Eleventh Circuit reversed a decision by the trial court awarding damages to six (of eleven) individual plaintiffs who were victims of

a racially discriminatory pay system. Motions for rehearing and rehearing en banc were denied February 8, 1994.

JURISDICTIONAL STATEMENT

(i) Date of entry of decree to be reviewed: January 4, 1993 (11th Circuit opinion).

(ii) Date of denial of Petitioners' motion for rehearing and motion for rehearing en banc: February 8, 1994.

(iii) Not applicable.

(iv) Jurisdiction is founded under 28 U.S.C. Section 1254(1): "Cases in the courts of appeals may be reviewed by the Supreme Court by... writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTORY PROVISIONS

42 USC Sec. 1981. Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 USC Sec. 2000e-2. Unlawful employment practice

(a) Employer practices:

It shall be an unlawful employment

practice for an employer...

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 USC Sec. 2000e-5

(e) Time for filing charges; time for service of notice of charge on respondent;

filing of charge by Commission with State or local agency:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge

shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, an a copy of such charge shall be filed by the Commission with the State or local agency.

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders:

If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the

complaint; the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years' prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligency by the person or persons discriminated against shall operate to reduce the back pay otherwise

allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS Section 2000e-3(a)].

STATEMENT OF THE CASE

This Petition for Certiorari asks this Court to review a decision of the United States Court of Appeals for the Eleventh Circuit which reversed a judgment from the United States District Court for the Middle District of Georgia in favor of six black employees who were victimized by a racially discriminatory pay system operated by Defendant from 1980 through 1990, the date of the final hearing on damages. (Appendix A, App. 32-37.)

The Eleventh Circuit reversed on grounds that the suit was time barred without reaching the merits although that issue was never raised at the trial of the case and although the Plaintiffs did not have the information available to them to file

a charge of discrimination. The Eleventh Circuit also ruled, directly contrary to rulings in this Court and other Circuits, that wage discrimination claims are not a continuing violation and are time barred if the employee does not file a charge of discrimination within 180 days of the first time the employer discriminates against the employee. (Id.)

This Petition also seeks review of the same decision which held that a wage freeze which perpetuates prior acts of discrimination is not an actionable wrong under Title VII. (Appendix A, App. 32.)

Curiously, in an unpublished opinion another panel of the Eleventh Circuit held in a related case involving two of the petitioners herein that the 1984 wage freeze was starting point for the

limitations period, even though the published decision Petitioners seek to review actually held that the October 1984 wage freeze was NOT a wrong actionable under Title VII. (See Appendix F, App. 239, 242-243.) However, the unpublished decision squarely rejects the precedent of this Court which holds that each week's paycheck is a new cause of action in a wage discrimination case. (Id. at App. 242-243.)

This Petition also seeks review of the Court of Appeals opinion which affirmed various rulings of the District Court during the trial, including rulings excluding direct evidence of racial antipathy on the part of Buckeye's management (use of the word "nigger", putting black employees in a "bull gang"

to do the dirtiest work available, arbitrarily firing black employees due to racial prejudice). Although agreeing that the evidence was germane to the issue and not repetitive (it was the only evidence of this sort and it came from a person who was also in management at the time the remarks were made), the Eleventh Circuit imposed a new rule holding that Plaintiffs' were specifically required to cite the evidence as "smoking gun" evidence or otherwise "highlight the significance" of the evidence when making their offer of proof to the District Court. (Appendix A, App. 18-20.)

This Petition also asks this Court to correct by Certiorari the Eleventh Circuit's holding that in a Title VII disparate treatment action, once the

employee has made out a prima facie case, the employer does not have to produce any evidence which would articulate a legitimate nondiscriminatory reason for preferring the white to the black employee. (Appendix A, App. 23.)

The background of this action is as follows: thirteen black present and former employees of a paper mill owned by Buckeye Cellulose Corp. sued under Title VII (42 USC Sec. 2000e-5(f)(3) by 11 of the plaintiffs) and 28 USC 1343 and 42 USC Sec. 1981 (all 13 plaintiffs) in separate cases consolidated for a jury trial in 1988 in the Middle District of Georgia. All 13 had causes of action regarding pay and conditions of employment. Two, Issiah Ross, Jr. and William Morgan Porter, also had causes of action

involving their being fired. (Appendix B, App. 53-54.)

The District Court found that during the long jury trial, the employees, all black, had proved that systematic wage discrimination existed against black employees because of the use of wholly arbitrary and subjective pay decisions. (Appendix B, App. 111.)

Two employees, Issiah Ross, Jr., and Gerry Plant, obtained jury verdicts on their behalf under 42 USC Section 1981- Ross for his termination for complaining about the discrimination against black employees, and Plant for wage discrimination. Six employees, including Ross, Plant, Tabitha Herring, James Homer, Johnny Palms, and John Taylor, were later awarded judgments by the trial court under

a Title VII disparate impact cause of action for the injuries caused by the application of the pay system. William Morgan Porter was unsuccessful on any claim, including his termination by the plant manager. (Appendix C, App. 117, 170.)

The facts essential to this appeal (as found by the District Court) are as follows: a pay system was implemented when the plaintiffs were hired and the plant opened in 1980. [Two plaintiffs, Scott and Slaughter, were hired with a group in 1981.] All new hires were paid the same weekly wage (initially $288 per week) and were given uniform raises over the first two years, with no preference being give due to seniority, prior education, prior skills, or prior work

experience. Starting in 1981 and 1982, the pay system changed, with arbitrary decisions being made by management to pay different weekly wages to different employees doing the same job. (Appendix B, App. 53-77.)

By 1984, this system resulted in white employees earning significantly higher weekly wages (as much as $142 each week) than black employees working side by side with them doing the same job. The company paid the white employees more because they were expected, over the course of coming months or years, to learn more skills than the black employees who were doing identical work with identical skill and effort. (Id.)

Each employee was given a schedule for anticipated advancement called a "career

plan", which was encompassed in a one page document. The document listed the skills the employee was expected to learn in the future. Also, the career plans provided that employees who were expected to learn more skills or more valuable skills (according to a secret points plan and a pay curve matrix) were to be prepaid in advance of actually learning those skills. (Appendix B, App. 71.) These career plans were changed every several months in some cases, but actual wages were determined by a "pay curve" assigned to each employee, which may or may not change in new career plans. (Id.)

The District Court found that white employees benefited from this system and blacks (including the prevailing plaintiffs) were generally awarded fewer

or less valuable skills, resulting in lower pay. Even after the pay system was abandoned in the fall of 1984 and pay curves were frozen, white employees were left on higher pay curves regardless of whether or not they actually acquired the skills in their career plans. (Appendix B, App. 71.)

The system was changed several times over the years, but in the fall of 1984 (no precise date was presented at trial, as there was no statute of limitations issue raised until months after the trial had ended), the pay system was "frozen" or "put on hold" and only cost of living raises were given until a new system was installed in the 1987-1988 period. No further career plans were to be assigned to employees, with the result that the pay

system froze black employees on lower pay rungs than white employees, with no hope of matching their white counterparts' earnings. (Appendix B, App. 70, 108.) For some plaintiffs, this disparity caused by the 1984 freeze lasted all the way through the last date the trial court heard evidence on the damages issue in 1990. (Appendix D, 179.)

The eleven plaintiffs with Title VII claims separately filed charges of discrimination in early 1985 (in January, March and April- the actual dates were not introduced at trial because no statute of limitations defense was raised at trial). In any event, the charges were filed within 180 days of each employee being discriminated against because of white employees earning a higher weekly wage and

also, incidentally, within 180 days of the wage freeze. (Appendix B, App. 88, 89.)

Eleven separate suits involving the Title VII plaintiffs were filed over the 1985-1987 period within 90 days of receiving right to sue letters from the EEOC. [Nannette Tyson and George Rumph filed a separate Title VII action and their only claims in the district court in this case involved 42 USC Section 1981. Appendix F.]

Although Buckeye raised a general defense of statute of limitations in its answers to the suits, no mention of the 180 day statute of limitations for filing EEOC charges was raised in the pretrial order in the section dealing with the Title VII disparate impact claims. No mention of the 180 day statute of

limitations for filing EEOC charges was made by Buckeye at any point during the four month jury trial in 1988 (evidence on both Title VII claims of disparate impact and Title VII and 42 USC Sec. 1981 claims of intentional discrimination was presented at the trial). No motion for directed verdict was made by Buckeye on grounds of the 180 day statute of limitations. (Appendix A, App. 47-50.)

Because the 180 day statute of limitations was not an issue, plaintiffs did not introduce their EEOC charges at trial, and they did not introduce any evidence which would have been pertinent to the issue- including any evidence pertinent to equitable tolling.

During the trial, all thirteen plaintiffs made out prima facie cases of

discrimination in pay for the purposes of their 42 USC Section 1981 and (for eleven plaintiffs) Title VII disparate treatment claims. However, Buckeye chose not to present any evidence from any person who made the pay decisions in any plaintiff's case as to why the plaintiff was paid less money for doing the same job as a similarly situated white employee in the same work area whose qualifications Buckeye rated as no higher than plaintiff's. Although Buckeye had not met its burden of production of evidence on this issue (it did not even attempt to articulate a justification for paying any of the plaintiffs less money than equally qualified- or in some cases, less qualified- white employees), the trial court denied plaintiffs' motions for

directed verdicts and judgments notwithstanding the verdict. (Appendix A, App. 20-24.)

During the trial, plaintiffs attempted to introduce evidence that specific managers with supervisory capacity over the plaintiffs, including the plant manager at the Oglethorpe, Georgia facility, had used racial epithets, referring to their black employees as "niggers", had put black employees in a "bull gang" which was assigned the "dirtiest work in the plant". Plaintiffs' also attempted to introduce evidence that the plant manager had arbitrarily fired or otherwise terminated black employees because he did not like having black people working for him. (Appendix A, App. 16, 17.)

This evidence was rejected by the trial court after an offer of proof was made because it involved acts committed by the managers when they worked at a different plant owned by Defendant before they were transferred to the Oglethorpe, Georgia facility in 1980. [The Eleventh Circuit's opinion incorrectly states this evidence was offered for "impeachment"; however, it is not relevant to this petition whether or not it was offered in Plaintiffs' case in chief, which, in fact, it was.] (Appendix A, App. 16-20.)

During closing argument on the issue of damages for the two plaintiffs who prevailed on their 42 USC Section 1981 claims (Ross and Plant), the trial court prohibited plaintiffs' counsel from commenting on or discussing evidence

introduced at trial concerning other acts of discrimination by Buckeye against black employees who worked there or from commenting on Buckeye's refusal to reinstate Ross, whom they had fired for protesting discriminatory practices by the Company. (Appendix A, App. 24, 25- the Eleventh Circuit was incorrect in its assertion that no evidence was introduced concerning the two individuals, although the trial court's order was sweeping enough to prohibit mention of any discriminatory acts against persons other than the two plaintiffs seeking damages, even though those matters were introduced into evidence at trial.)

The United States Court of Appeals reversed the District Court's decision holding that six of the Plaintiffs were

entitled to recover damages suffered by virtue of the application of a racially discriminatory pay system.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS, AND BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT, ON THE ISSUE OF WHETHER A BLACK EMPLOYEE SUING FOR WAGE DISCRIMINATION MUST FILE AN EEOC CHARGE WITHIN 180 DAYS OF THE FIRST OCCURRENCE OF AN ACT OF DISCRIMINATION

The United States Court of Appeals for the Eleventh Circuit has held in this case that a black person suing over wage discrimination where white persons are paid higher weekly wages for doing the same work must file a charge of discrimination with the EEOC within 180 days of the first time this event occurs, regardless of the lack of knowledge of the employee over the fact that he has been

the victim of discrimination and regardless of the fact that a separate discriminatory act occurs with the receipt of each week's paycheck.

The decision of the Eleventh Circuit directly conflicts with the decision of this Court in *Bazemore v. Friday*, 478 US 385, 395-396, 106 S Ct 3000, 92 L Ed 2d 315 (1986) and of the United States Court of Appeals for the Fourth Circuit in *Nealon v. Stone*, 958 F 2d 584, 591 (4th Cir. 1992) which hold that:

"Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII..."

Bazemore, supra.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS, AND BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT, ON THE ISSUE OF WHETHER A WAGE FREEZE WHICH PERPETUATES PRIOR DISCRIMINATORY ACTS IS A SEPARATE WRONG ACTIONABLE UNDER TITLE VII

The United States Court of Appeals for the Eleventh Circuit has decided in this case that a wage freeze which operates to perpetuate the effects of prior discrimination by leaving black employees on lower pay rungs than similarly situated white employees is not an event which violates Title VII. This contradicts the decisions of this Court in *Griggs v. Duke Power Co.*, 401 US 424, 91 S Ct 849, 28 L Ed 2d 148 (1971); *Bazemore v. Friday*, 478 US 385, 395-396, 106 S Ct 3000, 92 L Ed 2d 315 (1986); *Watson v. Fort Worth Banking Company*, 487 US 977, 987, 101 L Ed 2d 827, 108 S Ct 2777 (1989), and of the United

States Court of Appeals for the Tenth Circuit in *Thornton v. Coffey*, 618 F 2d 686, 690 (10th Cir. 1980)(policies, procedures or tests neutral on their face and/or intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices) and the Fourth Circuit in *United States v. Dillon Supply Company*, 429 F 2d 800, 803-804 (4th Cir. 1970).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS, AND BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT, ON THE ISSUE OF WHETHER A STATUTE OF LIMITATIONS DEFENSE CAN BE RAISED IN A FINAL BRIEF FILED SIX MONTHS AFTER TRIAL WHICH WAS NEVER AN ISSUE IN THE PRETRIAL ORDER OR DURING THE ENTIRE TRIAL

The United States Court of Appeals for the Eleventh Circuit has decided in its opinion in this case that a plaintiff's suit can be subject to dismissal after

trial on a statute of limitations defense not contained in the pretrial order and never raised at trial. Aside from the fact that this precluded Plaintiffs from putting forth any testimony on this issue at trial (such as evidence that pay decisions concerning individual plaintiffs such as Ross, Scott and Plant were within the 180 day statute of limitations even if the Eleventh Circuit is correct in its holding that wage discrimination is not a continuing violation and a wage freeze is not an actionable wrong), this holding conflicts with the decisions of other circuits in *Erff v. Markhon Industries, Inc.*, 781 F. 2d 613, 617 (7th Cir. 1986)("Because the parties rely on the pretrial conference to inform them precisely what is in controversy, the pre-

trial order is treated as superseding the pleadings and establishes the issues to be considered at trial.") and *Colonial Refrigerated Transportation, Inc. v. Worsham*, 705 F 2d 821 (6th Cir. 1983).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS BECAUSE THE ELEVENTH CIRCUIT HAS HELD THAT EVIDENCE OF RACIAL ANTIPATHY ON THE PART OF THE EMPLOYER'S TOP MANAGEMENT CAN BE EXCLUDED FROM TRIAL IF THE EMPLOYEES' TRIAL COUNSEL DOES NOT USE THE WORDS "SMOKING GUN" OR "OTHERWISE HIGHLIGHT THE SIGNIFICANCE OF THE EVIDENCE" WHEN MAKING AN OFFER OF PROOF

The United States Court of Appeals for the Eleventh Circuit has decided that direct evidence of racial epithets such as "nigger" and other antipathy on the part of decision-making managers (including the plant manager who devised the pay system and personally approved the firing of both

plaintiffs who were terminated) was properly excluded from consideration by the jury deciding a 42 USC Section 1981 action for intentional racial discrimination because the plaintiffs' counsel did not use the words "smoking gun" or "otherwise highlight the significance of the evidence." (Appendix A, App. 20.)

This decision conflicts with the decision of this Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and decisions of other circuits which have held that evidence of derogatory remarks or racial attitudes of the managers who were alleged to have engaged in discrimination against the plaintiffs was relevant and probative on

the issue of disparate treatment. *Pitre v. Western Elec. Co. Inc.*, 843 F. 2d 1262, 1270 (10th Cir. 1988)(managers who had "discrimina-tory attitudes toward women); *Brown v. Board of Trustees of Boston University*, 891 F. 2d 337, 349 (1st Cir. 1989)(derogatory remarks indicative of discriminatory attitude).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND THIS COURT AND OTHER CIRCUITS BECAUSE THE ELEVENTH CIRCUIT HAS HELD THAT AN EMPLOYER NEED NOT PRODUCE ANY EVIDENCE TO ARTICULATE A LEGITIMATE, NONDISCRIMINA-TORY REASON FOR PAYING A BLACK EMPLOYEE LESS MONEY THAN AN EQUALLY QUALIFIED WHITE EMPLOYEE DOING THE SAME JOB

The United States Court of Appeals for the Eleventh Circuit has decided that an employer need not articulate a legitimate, nondiscriminatory reason for paying black employees less than white employees who are no more qualified than the blacks and

doing the identical work. Instead, it has ruled that an employer may present evidence from persons other than the actual decision-makers that some individual plaintiffs (not all) had, over the course of eight years, "occasionally made operating errors, been late or absent from work, or shown character flaws," [Appendix A, App. 22] this justifies paying every plaintiff less money than identically situated white employees whom the employers' own pay system had rated no higher than the plaintiffs and who made similar operating errors, and had also been late or absent from work or had character flaws.

No evidence was presented by the employer that any of the aforementioned information was taken into account by any

decisionmaker when plaintiffs' pay was determined. No evidence was presented by the employer to explain why it paid more money each week to similarly situated white employees who committed similar minor infractions and who were rated no higher than the comparable plaintiffs. In fact, Buckeye never articulated a reason at any point during the trial to explain why it paid plaintiffs less money than white employees with no higher skills or effort (under its own rating system, flawed though it was) who performed the same job. Buckeye never even called to the stand some of the plaintiffs' decision makers on the issue of pay during the entire trial [nor was their testimony presented by any other means, such as through memoranda, other documents or

deposition].

This decision conflicts with this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253, 255, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981) and with the United States Court of Appeals *Mitchell v. Baldrige*, 759 F. 2d 80 85, fn. 3 (D. C. Cir. 1985); *Lincoln v. Board of Regents*, 697 F. 2d 928, 937 (11th Cir. 1983); *Nanty v. Barrows Company*, 660 F. 2d 1327, 1330, 1332 (9th Cir. 1981); *EEOC v. Am. Nat'l Bank* 652 F. 2d 1176, 1200 (4th Cir. 1981).

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE ELEVENTH CIRCUIT AND OTHER CIRCUITS BECAUSE THE ELEVENTH CIRCUIT HAS HELD THAT TRIAL COUNSEL MAY BE PROHIBITED FROM BRINGING UP EVIDENCE ADMITTED DURING TRIAL IN HIS FINAL ARGUMENT TO THE JURY

The Eleventh Circuit has ruled that a

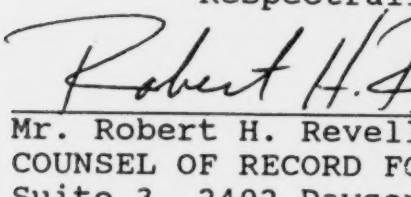
trial judge has the discretion to prohibit trial counsel from mentioning evidence properly admitted in that trial in his final argument to the jury. (Appendix A, App. 25). This ruling conflicts with rulings in other circuits which hold that a party is entitled to his legitimate argument to the jury so long as the argument is "confined to the issues of the case, the applicable law, the pertinent evidence, **and such legitimate inferences as may properly be drawn therefrom.**" *Chicago & N. W. Ry. Co. v. Kelly*, 84 F. 2d 569, 573 (8th Cir. 1936)(emphasis added).

CONCLUSION

For all of the previously stated reasons, Petitioners pray that this Court grant a writ of certiorari to review the

decision of the United States Court of Appeals for the Eleventh Circuit

Respectfully submitted,



Mr. Robert H. Revell, Jr. Ga Bar. #601337
COUNSEL OF RECORD FOR PETITIONERS
Suite 3, 2402 Dawson Road
Albany, Georgia 31707
(912) 434-0300

PLEASE SERVE:

James Finkelstein Ga. Bar #261375
Attorney for Petitioners
Suite 114 Albany Towers
235 Roosevelt Avenue
Albany, Georgia 31701
(912) 436-7824